Joan Fung @ Joan Fung Nyuk Lee v Allianz General Insurance Co (M) Bhd

HIGH COURT (SANDAKAN) — SUIT NO S22–48 OF 2009
LEE HENG CHEONG JC
12 APRIL 2011

Contract — Void contract — Contrary to public policy — Gratuity payable to retiring/resigning employees under retirement benefit scheme — Gross gratuity subject to deduction of employer's contributions to Employees Provident Fund (EPF) — Whether clause permitting deduction breached EPF Acts 1951 and 1991 — Whether employee's acceptance of gratuity so deducted amounted to waiver of rights or acquiescence — Whether parties could contract out of duty imposed by statute — Whether employee estopped from claiming refund of deducted sum — Contracts Act 1950 s 66

The plaintiff was employed by Commerce Assurance Bhd ('CAB'), whose rights, assets and liabilities were transferred to and vested in the defendant by a vesting order dated 9 December 2008. Prior to the vesting, the terms and conditions of the plaintiff's employment included a retirement benefit scheme that provided for payment of gratuity either upon the retirement or resignation of an employee. One of the clauses of that scheme stated that from the gross gratuity payable to an employee the total of the employer's contribution made towards the Employees Provident Fund (EPF) for that particular employee shall be deducted. The plaintiff resigned from her employment with CAB after 37 years of service in July 2008 and was informed that in accordance with the formula provided under the retirement benefit scheme, she would receive RM120,075 in gratuity. This was the balance after her employer's total EPF contribution to her account of RM238,529 was deducted from her gross total gratuity of RM358,604. The plaintiff agreed to accept the RM120,075. Subsequently, she sued the defendant for a declaration that the RM 238,529 deduction breached ss 9 and 47 of the EPF Acts of 1951 and 1991 ('the EPF Acts') respectively and was thus unlawful, illegal, null and void. The plaintiff claimed for the said sum to be returned to her with interest. The defendant argued that the plaintiff's claim was not maintainable as she had contractually agreed to the deduction being made, agreed not to take any legal proceedings against the defendant and had waived whatever rights, if any, she had, by accepting the final gratuity payment without protest. The defendant said the plaintiff was estopped from making its claim against the defendant. It was also

submitted that ss 9 and 47 of the EPF Acts did not apply as her employer's EPF contribution to her account was not deducted from her wages or remuneration.

Held, granting judgment to the plaintiff:

(1) The defendant was doing indirectly what could not be done directly in the circumstances of the present case. Their contention that for a deduction to fall within s 47(1) of the EPF Act 1991 there must be actual deduction of the monies paid into the employee's EPF account defeated the very purpose for which the EPF Act was enacted and rendered ss 9 and s 47(1) of the EPF Acts nugatory and obsolete (see para 37).

(2) The plaintiff was not estopped from claiming the RM238,529 because the words 'in ss 9 and 47(1) of the EPF Acts were clearly meant to prevent parties, especially employers, from circumventing the prohibition in the Acts by way of any contract whatsoever (see para 34(a)).

(3) Estoppel, waiver or acquiescence could not prevail against a statute, a common law of public policy or protect against an illegality. Since the EPF Acts were essentially social legislations to protect employees' interests, courts must give effect to them in the interest of public policy especially when it came to ss 9(1) and 47(1) of the said Acts where it was expressly provided that a breach of the same was illegal and a punishable offence (see para 34(d)).

(4) Sections 9 and 47(1) of the EPF Acts prohibited contracting out, or waiver of performance, of the statutory duty contained in those sections as they clearly began with the words 'notwithstanding any contract to the contrary' (see para 35).

(5) The knowledge of the parties as to the illegality of the contract was a non-issue. As such s 66 of the Contracts Act 1950 empowered the sums that had been deducted to be returned to the plaintiff (see para 38(c)).

[Bahasa Malaysia summary

Plaintif berkerja untuk Commerce Assurance Bhd ('CAB'), yang mana hak, aset dan liabilitinya dipindahkan kepada dan terletakhak pada defendan oleh suatu perintah peletakhakan bertarikh 9 Disember 2008. Sebelum peletakhakan tersebut, terma-terma dan syarat-syarat pekerjaan plaintif termasuklah skim faedah persaraan yang diperuntukkan bagi pembayaran gratuiti sama ada semasa persaraan atau peletakan jawatan seseorang pekerja. Salah satu klausa skim itu menyatakan bahawa daripada gratuiti kasar terbayar kepada pekerja yang jumlah caruman majikan dibuat terhadap pekerja Kumpulan Wang Simpanan Pekerja (KWSP) untuk pekerja tersebut, hendaklah ditolak. Plaintif meletak jawatan daripada CAB selepas perkhidmatan selama 37 tahun pada bulan Julai 2008 dan telah dimaklumkan bahawa menurut formula yang disediakan di bawah skim faedah persaraan,

beliau akan menerima gratuity sebanyak RM120,075. Ini adalah baki selepas jumlah caruman KWSP majikannya ke akaunnya sebanyak RM238,529 yang ditolak daripada jumlah gratuiti kasar sebanyak RM358,604. Plaintif telah bersetuju untuk menerima RM120,075. Selepas itu, beliau menyaman defendan bagi suatu perisytiharan bahawa potongan RM238,529 melanggar ss 9 dan 47 Akta KWSP 1951 dan 1991 ('Akta KWSP') masing-masing dan dengan itu menyalahi undang-undang. Plaintif mendakwa sejumlah wang tersebut dikembalikan kepadanya dengan kepentingan. Defendan menghujahkan bahawa tuntutan plaintif kekal kerana dia telah bersetuju secara kontrak dengan potongan yang dibuat, bersetuju untuk tidak mengambil sebarang tindakan undang-undang terhadap defendan dan telah mengenepikan apa-apa hak, jika ada, dengan menerima bayaran gratuiti akhir tanpa protes. Defendan menghujahkan bahawa plaintif telah diestop daripada membuat tuntutan terhadap defendan. Ia juga dihujahkan bahawa ss 9 dan 47 Akta KWSP tidak terpakai kerana caruman KWSP majikannya ke akaunnya tidak dipotong daripada gaji atau saraan.

Diputuskan, memberikan penghakiman untuk plaintif:

(1) Defendan melakukan secara tidak langsung apa yang tidak boleh dilakukan secara langsung dalam hal keadaan kes ini. Hujahan mereka bahawa untuk satu potongan terangkum di bawah s 47(1) Akta KWSP 1991 mesti terdapat potongan sebenar wang yang dibayar ke dalam akaun KWSP pekerja mengalahkan maksud sebenar yang mana Akta KWSP digubal dan menjadikan ss 9 dan s 47 (1) KWSP sia-sia dan ketinggalan (lihat perenggan 37).

(2) Plaintif tidak diestop daripada menuntut RM238,529 kerana perkataan 'Notwithstanding any contract to the contrary' dalam ss 9 dan 47(1) Akta KWSP jelas bertujuan untuk menghalang pihak-pihak, khasnya majikan, daripada memintasi larangan dalam Akta dengan cara apa-apa bentuk kontrak sekalipun (lihat perenggan 34(a)).

(3) Estopel, penepian atau persetujuan tidak boleh diguna pakai terhadap statut, undang-undang biasa dasar awam atau melindungi ketaksahan. Memandangkan Akta KWSP pada dasarnya undang-undang sosial bagi melindungi kepentingan-kepentingan pekerja, mahkamah mesti memberi kepentingan kepada mereka demi kepentingan dasar awam terutama apabila ia melibatkan ss 9 (1) dan 47(1) Akta di mana ia diperuntukkan secara nyata bahawa pelanggaran yang sama sah dan kesalahan yang boleh dihukum (lihat perenggan 34(d)).

(4) Seksyen 9 dan 47(1) Akta KWSP melarang berkontrak, atau pengenepian performa, tanggungjawab statutori yang terkandung dalam seksyen-seksyen kerana ia dengan jelas bermula dengan perkataan 'notwithstanding any contract to the contrary (lihat perenggan 35).

(5) Pengetahuan pihak-pihak yang menyalahi undang-undang kontrak bukan satu isu. Oleh itu s 66 Akta Kontrak 1950 membenarkan jumlah wang yang telah ditolak agar dikembalikan kepada plaintif (lihat perenggan 38(c)).]

Notes

For cases on contrary to public policy, see 3(2) *Mallal's Digest* (4th Ed 2011 Reissue) paras 6476–6480.

Cases referred to

Chong Thian Fook & Ors v Sarawak Shell Bhd & Ors and another appeal [2009] 5 MLJ 322; [2009] 5 CLJ 605, FC (distd)

Kok Hoong v Leong Cheong Kweng Mines Ltd [1964] MLJ 49; [1964] 1 All ER 300, PC (refd)

Legislation referred to

Contracts Act 1950 s 66
Employees Provident Fund Act 1951 s 9, 9(1)
Employees Provident Fund Act 1991 ss 47, 47(1)
Interpretation Acts 1948 and 1967 s 17A

Chris Thian (Christ Thian & Co) for the plaintiff.
Roger Chin (Chin Lau Wong & Foo) for the defendant.

Lee Heng Cheong JC:

INTRODUCTION AND UNDISPUTED FACTS

[1] The plaintiff was employed by AFIA Worldwide Insurance as a clerk/typist on 25 May 1971. She was subsequently appointed as American Malaysia Insurance Sdn Bhd's assistant branch manager. American Malaysian Insurance Sdn Bhd was converted into a public company limited by shares bearing the name of American Malaysian Insurance Bhd on 25 November 1994. Subsequently, American Malaysian Insurance Bhd changed its name to AMI Insurans Bhd on 11 June 1999. The plaintiff was later promoted to the position of senior manager in AMI Insurans Bhd, with effect from 1 April 2004. Sometime in 2005, AMI Insurans Bhd changed its name to Commerce Assurance Bhd.

[2] By virtue of a vesting order dated 9 December 2008, all rights, assets and liabilities of Commerce Assurance Bhd were transferred and vested with the defendant vide Kuala Lumpur High Court Suit No D7–26–98 of 2008. The plaintiff was never at any time, an employee of the defendant.

[3] During the plaintiff's employment with the respective companies above,

she was privileged with are retirement benefit scheme as provided under the AFIA and YOU booklet ('the booklet') which formed part of the terms and conditions of her employment.

[4] The retirement benefit scheme was set up by AFIA World Wide Insurance whereby long serving employees were given gratuity payments under the terms and conditions of the AFIA and YOU booklet and is not statutorily required.

[5] The salient terms in respect of the amount of any gratuity payment payable to the plaintiff under the booklet are set out below:

Retirement Benefit

Clause 2: If an employee shall have served AFIA for a continuous period of not less than seven years last preceding the date of his retirement, on such employee's retirement at the age of fifty five years or after that age AFIA shall pay to such employee a gratuity of one full month's salary for every completed year of service with AFIA.

Clause 3: There shall be adjusted or set of against the amount of the gratuity due to an employee at the date of his retirement:

(i) AFIA's total contributions in respect of such employee to the Employee Provident Fund in the States of Malaysia, paid by AFIA at the current rates under the existing laws of the Government of the States of Malaysia prevailing and in force from time to time Provided that nothing in this benefit shall enable AFIA to recover from such employee any contribution or any part thereof paid by AFIA, in respect of such employee, either directly or indirectly, which is not recoverable by AFIA under the provisions of the laws of the respective territories relating to the Funds hereinbefore mentioned.

Voluntary Resignation Benefit

If an employee voluntarily resigns after having served AFIA for a continuous period of not less than ten years but before he attains the age of fifty five years AFIA shall upon such resignation pay to him a percentage of the gratuity that would have been payable to an employee retiring under the retirement benefits described above, such percentage to be in accordance with the scale as set out in the Schedule below, provided that:

(a) The provisions of (3) above under the retirement benefit shall apply to the gratuity payable to an employee resigning under this benefit.

The Schedule is reflected as follows:

Name of Years of Continuous Service	The Percentage of Gratuity Applicable
10	50%
11	55%
12	60%

13	65%
14	70%
15	75%
16	80%
17	85%
18	90%
19	95%
20	100%

[6] Sometime in April 2006, the plaintiff was provided with an option by Commerce Assurance Bhd to either (a) forgo her retirement benefits under the booklet in exchange for an increase in salary; or (b) maintain her current retirement benefits under the booklet with no salary adjustment. This is due to the fact that her retirement benefits could not be harmonised with the other existing entities within the commerce group.

[7] In any election, the plaintiff would voluntarily agree not to pursue any legal action whatsoever against Commerce Assurance Bhd.

[8] The plaintiff subsequently agreed sometime in May 2006 that she would maintain her current retirement benefits under the booklet with no salary adjustment and further agreed not to pursue any legal action against Commerce Assurance Bhd.

[9] The plaintiff subsequently resigned from her employment with Commerce Assurance Bhd vide a notice of resignation dated 17 July 2008. Commerce Assurance Bhd had accepted her resignation on 21 July 2008. On the same day, Commerce Assurance Bhd informed the plaintiff that the gross total gratuity payment in accordance with the formula provided for under the booklet are as set out below:

Basic Salary	RM 9,692
Years in service	x 37
	RM358,604
EPF Employer Portion	(RM238,529)
Gratuity Amount Payable	RM 120,075

[10] The plaintiff had accepted that her final gratuity payment amounting to RM120,075. Vide an e-mail dated 4 February 2009, the plaintiff had requested that the payment of the above sum less any statutory deduction be made to her CIMB bank account.

[11] The defendant had subsequently on 11 February 2009, released payment in the sum of RM83,446.36 to the plaintiff.

[12] Prior to 11 February 2009, the plaintiff had never raised any issue or objected to the calculation of her retirement benefit scheme under the booklet.

[13] The plaintiff in the course of her employment has been credited with the entire portion of her own and the defendant's predecessors' contributions to the Employees Provident Fund including the sum of RM238,529. Such sums remain to her credit and are unaffected by the gratuity scheme in the booklet.

THE PLAINTIFF'S CLAIMS

[14] In the plaintiff's statement of claim herein, the plaintiff is claiming in essence that the defendant's act in deducting the sum of RM238,529 from the Employees Provident Fund, employer's portion of the plaintiff's EPF account contravened the provisions of the Employees Provident Fund Act 1951 and/or s 47 of the Employees Provident Fund Act 1991.

[15] The plaintiff claimed against the defendant for,inter alia, the followings:

(a) a declaration that the deduction of the employer portion of RM238,529 under the Employee Provident Fund by the defendant is unlawful, illegal, null and void;

(b) the sum of RM238,529 from the plaintiff's gratuity voluntary resignation benefit; and

(c) interests.

THE DEFENDANT'S DEFENCE

[16] The defendant's defence, inter alia, in essence is as follows:

(a) that the plaintiff has accepted, represented and agreed that any voluntary resignation benefit provided to her upon her resignation shall be adjusted or set off against the amount of the employer's total contributions in respect of such employee to the Employees Provident Fund;

(b) that s 9 of the Employees Provident Fund Act 1951 and/or s 47 of the Employees Provident Fund Act 1991 are not applicable here as the defendant and/or Commerce Assurance Bhd is not making any deduction but rather applied cl 12(3) of the AFIA AND YOU Booklet in achieving the total gratuity payment of RM120,075 paid to the plaintiff; and

(c) that the defendant is stopped from making any claim against the defendant by reason that the plaintiff had accepted such an arrangement that the total gratuity payment that would be paid is subject to the set- off or deduction from the employer's total contribution in respect of such employee to the EPF in arriving at the total gratuity amount.

ISSUES TO BE TRIED

[17] From my reading and analysis of the pleadings and evidence adduced in this case, I find that the following issues are pertinent and relevant in disposing off this case and they are as follows:

(a) whether the Federal Court case of *Chong Thian Fook & Ors v Sarawak Shell Bhd & Ors and another appeal* [2009] 5 MLJ 322; [2009] 5 CLJ 605 is relevant and/or binding on this court;

(b) whether the defendants' deduction of RM238,529 (being the employer's total contributions towards the Employees' Provident Fund) of which deduction was made pursuant cl 12(3) of the AFIA AND YOU booklet, was in contravention of s 9 of the Employees Provident Fund Act 1951 and/or s 47(1) of the Employees Provident Fund Act 1991;

(c) whether the plaintiff is estopped from claiming the sum of RM238,529;

(d) whether s 9 of the Employees Provident Fund Act 1951 and/or s 47(1) of the Employees Provident Fund Act 1991 prohibited contracting out or waiver;

(e) whether estoppel, waiver or acquiescence can prevail against a statute of public policy or to protect against an illegality?

(f) whether the defendant can rely on a defence of illegality to bar the plaintiff's claim.

CONSIDERATION OF THE ISSUES

Whether the Federal Court case of Chong Thian Fook & Ors v Sarawak Shell Bhd & Ors is relevant and/or binding on this court?

[18] I shall first deal with this issue as if I were to rule that the Federal Court case of *Chong Thian Fook & Ors v Sarawak Shell Bhd & Ors and another appeal* [2009] 5 MLJ 322; [2009] 5 CLJ 605, is relevant and binding on this court, then I have no alternative but to dismiss the plaintiff's claim herein.

[19] The defendants submitted that this court is stare decisis bound by the decision of the Federal Court in *Chong Thian Fook & Ors v Sarawak Shell Bhd & Ors and another appeal* [2009] 5 MLJ 322; [2009] 5 CLJ 605. I shall now

proceed to examine the judgments of the Federal Court in *Chong Thian Fook & Ors v Sarawak Shell Bhd & Ors and another appeal* [2009] 5 MLJ 322; [2009] 5 CLJ 605. In determining whether this court is bound, I will have to determine the ratio decidendi of the Federal Court in *Chong Thian Fook & Ors v Sarawak Shell Bhd & Ors and another appeal* [2009] 5 MLJ 322; [2009] 5 CLJ 605.

[20] I find that there is no principle of law (ratio decidendi) that was laid down by the Federal Court in *Chong Thian Fook & Ors v Sarawak Shell Bhd & Ors and another appeal* [2009] 5 MLJ 322; [2009] 5 CLJ 605, therefore, the case of *Chong Thian Fook & Ors v Sarawak Shell Bhd & Ors and another appeal* [2009] 5 MLJ 322; [2009] 5 CLJ 605 does not bind this court and can be distinguished on the facts on the following grounds. The Federal Court in *Chong Thian Fook & Ors v Sarawak Shell Bhd & Ors and another appeal* [2009] 5 MLJ 322; [2009] 5 CLJ 605 was dealing with very different contractual terms. Unlike the AFIA AND YOU booklet terms in the present case, which expressly stipulated a deduction or set off of the employers' EPF contribution, the Federal Court case of *Chong Thian Fook & Ors v Sarawak Shell Bhd & Ors and another appeal* [2009] 5 MLJ 322; [2009] 5 CLJ 605's relevant contractual terms (known as reg 5 and reg 7) do not have express provisions for the deduction of employers' EPF contribution. The Federal Court in *Chong Thian Fook & Ors v Sarawak Shell Bhd & Ors and another appeal* [2009] 5 MLJ 322; [2009] 5 CLJ 605 decided that since the lump sum calculation did not involve reg 7, there was no necessity to embark on an interpretation of s 47(1) of the EPF Act 1991 in order to determine whether there was contravention of the section.

[21] The facts of *Chong Thian Fook v Sarawak Shell* is different from the present case namely:

(a) Unlike the cl 12(3) of the AFIA AND YOU booklet terms which expressly provided for the deduction of the employers' EPF contribution, the relevant contractual terms in *Chong Thian Fook & Ors v Sarawak Shell Bhd & Ors and another appeal* [2009] 5 MLJ 322; [2009] 5 CLJ 605 case are very different.

(b) The relevant terms of contract in *Chong Thian Fook & Ors v Sarawak Shell Bhd & Ors and another appeal* [2009] 5 MLJ 322; [2009] 5 CLJ 605 related to reg 5 and reg 7 of a scheme known as the Shell Sarawak & Sabah Retirement Benefit Fund ('RBF'). The RBF was established in 1976. Its historical set up went back to pre 1968 when it was called Shell Malaya Retiring Fund ('SMRF'). In 1968, the SMRF was wound up and the Shell Sarawak Sabah Pension Fund ('SSS Pension Fund') was put into place. In 1976, the SSS Pension Fund was dissolved and the RBF was established.

(c) The said reg 5 provided the mechanism for calculating the benefit payable. Regulation 5(2) provided for a lump sum to be paid to the employee when he leaves the company. It also mentioned that the lump sum shall be calculated in accordance with subclause reg 5(3) and that the sum will be reduced by authorised deductions at the said reg 7.

(d) The exact wording of reg 5 is as follows:

> (1) When a Member leaves Company Service (other than a Member who dies in Company Service) the benefit due from this Fund shall be calculated in accordance with the following provisions of this Regulation and the net amount thereof shall be settled in accordance with Regulation 8. No benefit shall be due to a Member who leaves Company Service, other than at age 55 of chronic disability, with less than 5 years' Accredited Service (unless in view of some exceptional circumstances the Trustees at the request of the Employing Company determine otherwise)
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> (2) The benefit due from this Fund shall be a lump sum sufficient to bring the aggregate of:
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> (a) so much of a Member's balance at the time he leaves Company Service as amounts to:
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> (aa) contributions for the period prior to 1st January 2001; and
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> (bb) contributions in respect of basic salary plus annual bonus for the period commencing 1st January 2001;
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> made by his Employing Company or Companies for the time being (whether or not such Company or Companies are Member Companies of the Fund) during any period which counts as Accredited Service, plus interest thereon:
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> (i) the Local Provident Fund, and
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> (ii) the State Fund, and
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> (iii) such other funds as the Trustees may from time to time designate for the purposes of this sub-clause; and
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> (b) the benefit (if any) actually paid by this Fund or by any such fund as is mentioned in or designated under paragraph (a) of this sub-clause in respect of any previous period of Company Service which is intended in his Accredited Service, up the level of benefit specified in sub-clause (3) hereof. In every case the lump sum shall be reduce by the Authorised Deductions mentioned in Regulation 7.
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> (3) (a) The lever of benefit applicable to a Member who
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> (i) has reached age 55, or
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> (ii) has reached age 50 and has left Company Service with the consent of his Employing Company, or

(iii) has left Company Service because of chronic disability,

shall be either the aggregate of

2.25 x Relevant Earnings x years of Accredited Service up to 31/12/1990,

2.8 x first M$1,000 of Relevant Earnings x years of Accredited Service from 1/1/1991,

2.5 x next M$1,000 of Relevant Earnings x years of Accredited Service from 1/1/1991

2.2 x balance of Relevant Earnings x years of Accredited Service from 1/1/1991;

Or

2.25 x Relevant Earnings x years of Accredited Service; whichever level of benefit is the greater.

(b) The level of benefit for each year of Accredited Service applicable to a Member who has not reached age 55 but has Accredited Service of 25 years or more shall be 2.25 x Relevant Earnings.

(e) Regulation 7(1)(c) stated as follows:

7. (1)The Authorised Deductions to be made in calculating the amount of a Member's benefit will be the sum of the following amounts:

(a) ...

(b) ...

(d) Subject to sub-clause (3) hereof, the amount of any payments which any Company shall be law or pursuant to any collective contract or to any award judgment or order of any Court or Tribunal be or have been required to make to the Member or any other person in respect of any part of the Member's Accredited Service by way of additional remuneration or benefit beyond his ordinary remuneration or in connection with any termination of his service with that Company; and for the purposes of this paragraph the expression "collective contract" shall mean any agreement between the employer and any trade union or group of employees or any body or person on behalf of any employees; compound interest on the amounts stated in this paragraph shall run from the respective dates of each payment down to the relevant date;

(f) The plaintiffs' contention in *Chong Thian Fook*'s case, was that when they severally received their RBF entitlement from the defendants/employers, they discovered that from their entitlements there, had been made deductions of their employers' contributions to the EPF and the PF, and of interests or dividends declared on those contributions. They contended that the deductions were in contravention of law, particularly

the EPF Act 1951 and 1991. The provisions of the EPF Acts that they were contravened were s 9(1) of the EPF Act 1951 Act and s 47(1) of the EPF Act 1991 Act respectively.

(g) The defendant in *Chong Thian Fook*'s case, denied the deductions. Their contention was that by virtue of the said reg 5(2), the benefit due to a member from the RBF was a lump sum sufficient to bring the aggregate of the EPF and PF contributions and the interest on them up to the appropriate level specified in reg 5(3), that the sufficient lump sum was therefore the difference between that level and the said aggregate, and that the payment of the lump sum did not involve any deduction whatsoever. The defendants' case, therefore, did not involve reg 7(1)(c) at all.

(h) As can be seen, *Chong Thian Fook*'s case dealt with different terms known as reg 5 and reg 7 and how the lump sum is to be calculated. It is pertinent to note that reg 5 and reg 7 do not expressly provide for the deduction of employers' EPF contribution. In contrast, cl 12(3) of the AFIA AND YOU booklet in the present case, expressly provided for EPF deduction in unequivocal terms as follows:

> There shall be *adjusted or set off against* the amount of gratuity due to an employee at the date of his retirement: (a) *AFIA' total contributions* in respect of such employee to the Central Provident Fund in Singapore and/or the Employees Provident Fund in the States of Malaysia. (Emphasis added.)

(i) The Federal Court in *Chong Thian Fook & Ors v Sarawak Shell Bhd & Ors and another appeal* [2009] 5 MLJ 322; [2009] 5 CLJ 605 at p 606 also held:

> Held
>
> (3) The respondents were right in their stand that in arriving at the lump sum, they acted within reg 5(2) and the manner in which they arrived at the lump sum *did not involve reg 7*. As such, there *was no question of contravention of any of the relevant provisions in the 1951 Act and 1991 Act.*
>
> (4) *Reading reg 7* as a whole, it *could not have been the intention* to include contributions into funds such as EPF. *It would have been so stated.* Regulation 7 was more related to any additional payments made or due to a member of RBF but did not extend to include contributions described in reg 5. (Emphasis added.)

(j) In view of the above, I find that the Federal Court in *Chong Thian Fook & Ors v Sarawak Shell Bhd & Ors and another appeal* [2009] 5 MLJ 322; [2009] 5 CLJ 605 did not actually delivered a decision based on s 9 of the Employees Provident Fund Act 1951 and/or s 47(1) of the Employees Provident Fund Act 1991, that the remarks of 'arithmetical formula' and

'non deprivative deduction' were made in the absence of a proper determination of the legal meaning of s 9 of the Employees Provident Fund Act 1951 and/or s 47(1) of the EPF Act 1991 and that the relevant contractual terms in *Chong Thian Fook & Ors v Sarawak Shell Bhd & Ors and another appeal* [2009] 5 MLJ 322; [2009] 5 CLJ 605 are not similar to the terms in the present case.

Whether the defendants' deduction of RM238,529 (the employer's total contributions towards the Employees' Provident Fund) of which deduction was made pursuant cl 12(3) of the AFIA AND YOU booklet, was in contravention of s 9 of the Employees Provident Fund Act 1951 and/or s 47(1) of the Employees Fund Act 1991?

[22] It is undisputed that cl 12(3) of AFIA AND YOU booklet has express provisions for deduction of the Employers' EPF contribution. The express provisions are:

> There shall be *adjusted or set off against* the amount of gratuity due to an employee at the date of his retirement: (a) *AFIA' total contributions* in respect of such employee to the Central Provident Fund in Singapore and/or the Employees Provident Fund in the States of Malaysia. (Emphasis added.)

[23] Section 9 of the Employees Provident Fund Act 1951 provides as follows:

> (1) *Notwithstanding any contract to the contrary*, the employer *shall not* be entitled to *deduct* from the *wages or remuneration* of, or otherwise to recover from, the employee, the *employer's contribution.* (Emphasis added.)

[24] Section 47(1) of the EPF Act 1991 provides as follows:

> (1) *Notwithstanding any contract to the contrary*, the employer *shall not* be entitled to *deduct or otherwise recover* from the *wages or remuneration* of the employee, the *employer's contribution*, from the employee. (Emphasis added.)

[25] Both s 9 of the Employees Provident Fund Act 1951 and s 47 of the EPF Act 1991 respectively further provided criminal sanctions for breach of the respective sections.

[26] To answer the above issue, I would need to refer to the following and various principles of statutory interpretation cited in Bennion on *Statutory Interpretation* (5th Ed) ('Bennion').

(a) *The plain meaning rule*

It is a rule of law (in this Code called the plain meaning rule) that where, in relation to the facts of the instant case:

(a) the enactment under inquiry is grammatically capable of one meaning only, and

(b) on an informed interpretation of that enactment the interpretative criteria raise no real doubt as to whether that grammatical meaning is the one intended by the legislator, the legal meaning of the enactment corresponds to that grammatical meaning, and is to be applied accordingly

(b) *Presumption that text is primary indication of legal meaning*

In construing an enactment, the text of the enactment, in its setting within the Act or other instrument containing it, is to be regarded as the pre-eminent indication of the legislator's intention

(c) *Presumption that literal meaning to be followed*

Prima facie, the meaning of an enactment which was intended by the legislation (in other words its legal meaning) is taken to be that which corresponds to the literal meaning

[27] Applying the above principles, the legal meaning of s 9 of the Employees Provident Fund Act 1951 and/or s 47(1) of the EPF Act 1991 is clear. There is nothing grammatically ambiguous about the meaning. The operative elements of the section consists of three components, namely:

(a) Notwithstanding any contract to the contrary;

(b) employer shall not deduct or recover his portion of the EPF contribution; and

(c) from the employees' wages or remuneration.

[28] The 'plain meaning rule' must be subjected to s 17A of the Interpretation Acts 1948 and 1967 which requires a purposive approach to any enactment.

17A Regard to be had to the purpose of Act

In the interpretation of provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object

[29] Bennion recognised this when he stated that there is a presumption that enactment to be given a purposive construction

> Parliament is presumed to intend that in construing an Act the court, by advancing the remedy which is indicated by the words of the Act for the mischief being dealt with, and the implications arising from those words, should aim to further every aspect of the legislative purpose. A construction which promotes the remedy Parliament has provided to cure a mischief is now known as a purposive construction:

[30] From the contention of the defendants herein, they are contending that that for a deduction to fall within s 47(1) of the EPF Act 1991, there must be an actual deduction/deprivation/depletion of the monies paid into the employees' EPF account. In other words, the monies representing the defendants' EPF contribution that has been credited into the plaintiff's account with EPF must be physically deducted or recovered. The defendants are also contending that as long as what had been paid, remains intact and remains in credit in the plaintiff's EPF account, then there is no deduction within the meaning of s 47(1) of the EPF Act 1991.

[31] Applying the above quoted principles of statutory interpretation in particular s 17A of the Interpretation Acts 1948 and 1967 to the above contention of the defendants, I find that the defendants' above contention and construction in fact would defeat the very purpose for which, the Employees Provident Fund Act was enacted and would render s 9 of the Employees Provident Fund Act 1951 and/or s 47(1) of the EPF 1991, nugatory and obsolete.

[32] In support of my above finding, I rely on the following rules and presumptions in *Bennion*:

(a) *The Rule — Ut res maais valeat quam pereat*

(i) It is a rule of law that the legislator intends the interpreter of an enactment to observe the *maxix ut res magis valeat quam pereat* (*it is better for a thing to have effect that to be made void*); so that he must construe the enactment in such a way as *to implement, rather than defeat,* the *legislative purpose* (Emphasis added.)

(ii) Bennion commented that 'an Act must be construed so that its provisions are given force and effect rather than being rendered nugatory'

(b) *Construction which otherwise defeats legislative purpose*

> The principle requiring a construction against evasion is *not limited to cases of deliberate* or obvious evasion. It *extends to any way* by which an Act's integrity of purpose may be *undermined, even innocently or unwittingly.* (Emphasis added.)

(c) *Presumption that consequential construction to be given.*
Bennion said:

> It is presumed to be the legislator's intention that the court when considering, in relation to the facts of the instant case, which of the opposing constructions of the enactment corresponds to its legal meaning, *should assess the likely consequences of adopting each construction*, both to the parties in the case and (where similar facts arise in future cases) for the law generally. *If on balance*, the consequences of a particular construction are *more likely to be adverse than beneficent*, this is a factor *telling against that construction.* (Emphasis added.)

Therefore, in view of the above principles of statutory interpretation and the facts of the present case, I find that since the construction placed by the defendants leads to an adverse construction, this court ought not give it effect.

(d) *Methods of Evasion: Doing Indirectly What Must Not Be Done Directly*
Bennion said:

> Where an enactment prohibits the doing of a thing, the *prohibition is taken to extend to the doing of it by indirect or roundabout means, even though not expressly referred* to. (Emphasis added.)

I find that the defendants are doing indirectly what cannot be done directly in the circumstances of the present case.

Whether the plaintiff is estopped from claiming the sum of RM238,529?

[33] The defendants contended that the plaintiff is estopped from claiming against the defendants on three grounds namely:

(a) That the plaintiff was bound by the contractual terms of the booklet;

(b) that the plaintiff's acceptance of the terms of the booklet and agreement not to commence legal proceedings against the company; and

(c) that there was waiver on the part of the plaintiff not to commence this suit by acceptance of her final gratuity payment without any protest.

[34] I find that the plaintiff is not estopped from claiming the sum of RM238,529 based on the following grounds.

(a) The defendants' contention goes against the clear and unambiguous words of s 9 of the Employees Provident Fund Act 1951 and/or s 47(1) of the EPF Act, which provided at the very outset that:

> *Notwithstanding any contract to the contrary*, the employer shall not be entitled to deduct. (Emphasis added.)

As such, I find that Parliament's intention is clear. The words 'Notwithstanding any contract to the contrary' was clearly meant to prevent parties especially employers from circumventing the prohibition in the Act by way of any contract whatsoever.

(b) Further Bennion stated that the wordings of the legislation can expressly prohibit contracting out of protection conferred on a person. This is illustrated by the principle known as *pacta private juri public derogare non possunt*. This is what Bennion said:

> *Where contracting out and waiver not allowed*
>
> Where a person is entitled by virtue to the performance of a duty by another person, and the case is within the principle pacta private juri public derogare non possunt (*a public right is not overridden by the agreements of private persons*), then the person under the duty cannot effectively contract out of performing it and the beneficiary cannot effectively waive its performance. (Emphasis added.)

Bennion further stated that 'the question whether it is possible to contract out, or waive performance, of a statutory duty depends always on the wording of the legislation. A well drafted modern Act makes the matter clear'.
The wordings of s 9 of the Employees Provident Fund Act 1951 and/or s 47(1) of the EPF Act 1991 made it quite clear by the words 'notwithstanding any contract to the contrary …'

(c) It is fundamental principle of law that an estoppel cannot prevail against a statue, a common law of public policy or protect against an illegality. Since the Employees' Provident Fund Acts are essentially social legislations to protect the employees' interest, courts must therefore give effect to in the interest of public policy. This is especially so when it comes to ss 9(1) and 47(1) of the EPF Act whereby it is expressly provided that a breach of the same is illegal and a punishable offence.

(d) It is trite law, that a statute of public policy or to protect against an illegality is indefeasible by estoppels/waiver. This principle is referred to in the textbook, *Estoppel by Conduct and Election* by Mr Justice Kennedy Handley (Sweet & Maxwell). The principle was applied by Viscount Radcliffe in *Kok Hoong v Leong Cheong Kweng Mines Ltd* [1964] MLJ 49; [1964] 1 All ER 300 as follows:

> The respondent has invoked in support of its defence a principle which appears in our law in many forms, that a party cannot set up an estoppel in the face of a statute. Thus a corporation on which there is imposed a statutory duty to carry out certain acts in the interest of the public cannot preclude itself by estoppels in pais from performing its duty and asserting legal rights accordingly …

> It does not appear to the Their Lordships that the principle is confined to transactions that have been made the subject of legislation … the common law may itself prohibit the enforcement of certain contracts such as those of an infant not for necessaries, and it cannot be supposed that it would any the less refuse to base a judgment on an estoppels against an infant who had so contacted.
>
> An infant who … obtained goods … by representing himself to be of full age cannot be estopped from setting up his infancy, …
>
> ... It has been said that the question whether an estoppel is to be allowed or not depends on the whether the enactment or rule of law relied on is imposed in the public interest or 'on grounds of general public policy'... However, a principle as widely stated as this might prove to be rather an elusive guide, since there is no statute, at least public general statue, for which this claim might not be made. In Their Lordships' opinion *a more direct test* to apply in any case such as the present, where the laws of money lending or monetary security are involved, *is to ask whether the law that confronts the estoppels can be seen to represent a social policy to which the court must give effect in the interest of the public generally or some section of the pubic, despite any rule of evidence as between themselves that the parties may have created by their conduct or otherwise.* Thus the laws of gaming or usury (*Carter v James*) *override an estoppel*: so do the provisions of the Rent Restriction Acts with regard to orders for possession of controlled tenancies (*Welch v Nagy*). (Emphasis added.)

Whether s 9 of the Employees Provident Fund Act 1951 and/or s 47(1) of the Employee Provident Fund 1991 prohibited contracting out or waiver?

[35] I find that s 9 of the Employees Provident Fund Act 1951 and/or s 47(1) of the Employees Provident Fund 1991 prohibited contracting out or waiver for the reasons stated in para (c) above.

Whether estoppel, waiver or acquiescence can prevail against a statute of public policy or to protect against an illegality?

[36] I find that estoppel, waiver or acquiescence cannot prevail against a statute of public policy or to protect against an illegality for the reasons stated in para (c) above.

Whether the defendant can raise and rely on a defence of illegality to bar the plaintiff's claim?

[37] I agree with the contention of the plaintiff that this was never raised in the defendants' pleadings and that it was only raised after the trial. Nonetheless,

it is trite law that it is always open to a court to take cognisance of illegality at any stage of the proceedings even though it has not been pleaded.

[38] I find that there are no merits in this defence of the defendants based on the followings:

(a) Section 66 of the Contracts Act 1950 states:

> When an agreement is *discovered to be void*, or when a contract *becomes void*, any *person who has received any advantage* under the agreement or contract is *bound to restore it, or to make compensation* for it, to the person from whom he received it. (Emphasis added.)

(b) *Sinnadurai, on Law of Contract* (3rd Ed), said that s 66 operates when the contract is *discovered* to be void or *becomes* void. The test is whether *at the time the contract was made*, the parties were aware of the illegality.

(c) The knowledge of the parties were never made into an issue. The defendant never pleaded that the plaintiff was aware of the illegality or vice versa. Clearly, this a non-issue. As such, s 66 of the Contracts Act 1950 empowers the sums that have been deducted to be returned to the plaintiff.

[39] In any event, I find that the defendants fall foul of the principle of *Allegans suam turpitudinem non est audiendus* (a person alleging his own wrongdoing is not to be heard).

[40] Bennion said:

> Unless the contrary intention appears, an enactment by implication imports the principle of the maxim *Allegan suam turpitudinem non est audiendus* (a person alleging his own wrongdoing is not to be heard).

ORDER

[41] In the light of the above, I therefore entered judgment in favour of the plaintiff in terms as prayed for in the statement of claim.

Judgment granted to plaintiff.

Reported by Ashok Kumar